

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDY GRAHAM,

Defendant.

Case No. 1:98-CR-54-03

Hon. Richard Alan Enslen

ORDER

Defendant Randy Graham has filed a *pro se* motion which requests re-sentencing in light of the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). The *pro se* motion is filed at a time when Defendant is appealing this Court's denial of his section 2255 motion (which did not include a *Blakely* issue nor one under *United States v. Booker*, 125 S. Ct. 738 (U.S. Jan. 12, 2005)).¹ This appeal is pending as #05-1345. Because the denial of section 2255 relief is presently on appeal, the Court's only jurisdiction is limited to actions consistent with the procedure in *First Nat'l Bank v. Hirsch*, 535 F.2d 343 (6th Cir. 1976). Thus, the Court is only empowered to indicate to the Court of Appeals its intent to grant a Rule 60 motion on remand (but is not empowered to grant a Rule 60 motion in the absence of the remand). *See id.*

Having considered Defendant's motion in this light (as a *pro se* motion under *Hirsch* to indicate its intent), this Court finds that no relief is warranted. Given the *Booker* decision, there is

¹Defendant did, during the pendency of the section 2255 motion, seek to amend the motion to include a *Blakely* issue. Such motion was denied at the time because of the Circuit's *en banc* decision in *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004). While the decision in *Koch* was essentially repudiated by *Booker*, the *Booker* decision did not apply a *Blakely* remedy and Defendant did not timely assert a *Booker* issue.

little likelihood that the Supreme Court will apply a *Blakely* remedy as to federal sentencing (at least such was not its holding). Further, Defendant has not timely asserted a *Booker* argument and the Circuit's holding in *Humphress v. United States*, 398 F.3d 855, 860 (6th Cir. 2005) indicates rather clearly that he is not entitled to relief under *Booker*.

THEREFORE, IT IS HEREBY ORDERED that Defendant Randy Graham's *pro se* Motion (Dkt. No. 406) is **DENIED**.

DATED in Kalamazoo, MI:
July 18, 2005

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE